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IN THE

SUPREME COURT OF THE UNITED STATES

Joseph Robinson,
PETITIONER

vs.

California, Plumas County, Jeff Cunan, Garrett Olney, Ira Kaufman, William Pangman, and Gary McGowan,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS PLUMAS COUNTY, JEFF CUNAN AND GARY MCGOWAN

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QUESTIONS PRESENTED FOR REVIEW

Does the constitutional right to counsel guarantee a criminal defendant the right to collect damages from a county or individual prosecutors where the defendant's conviction was subsequently reversed because of the trial court's failure to provide counsel, or to secure a valid waiver, at the preliminary examination from which the defendant's testimony was used at trial in state court?

_____Does the constitutional right to counsel negate absolute immunities provided prosecutors under state and federal law when prosecutors perform their courtroom obligations on behalf of the state?

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SUMMARY OF THE ARGUMENT

In Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79 (1955), this Court reiterated its longstanding rule:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

The instant case, while potentially within this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1), does not meet either of the usual requirements for granting certiorari review.

Although Petitioner cites rule 10(c) of the United States Supreme Court Rules as the basis for his writ petition, he fails to demonstrate how this case fits within the rule's stated parameters. The memorandum opinion of the Ninth Circuit Court of Appeals affirming the District Court's decision dismissing Petitioner's action does not decide an important question of federal law that has not been, but should be, settled by this Court. It has long been established that state prosecutors may invoke statutory immunity from civil liability under 42 U.S.C. §§ 1983 and 1985, since the alleged violation here stemmed directly from individual Respondents' prosecutorial function. Moreover, the Ninth Circuit Court of Appeals did not decide any important federal question in a way that conflicts with relevant decisions of this Court. Again, it simply restated well established law. Petitioner nowhere suggests otherwise.

In the framework of a vituperative philosophical tract, Petitioner merely expresses frustration that he has been unable to recover money damages from any person or entity to compensate for his period of imprisonment before the California Court of Appeal reversed his felony conviction for, among other things, transporting marijuana and offering it for sale while armed with a firearm. Although it is true that the

criminal trial court was deemed to have erred in admitting Petitioner's preliminary examination transcript testimony at trial, such determination did not implicate the conduct of the prosecutors or Plumas County, their employer. The prosecutors did not improperly prevent the criminal trial court from appointing counsel at Petitioner's preliminary examination or, alternatively, procuring a valid waiver of Petitioner's right to an attorney. They simply performed their role as advocates, without ever engaging in untruthfulness.

Moreover, this case is no different from the vast number of other cases in which a criminal conviction is ultimately reversed on appeal, but only after the criminal defendant has already served at least some portion of his sentence. Petitioner tacitly rejects altogether the established principle of prosecutorial immunity, but suggests no legal authority supporting his idiosyncratic position that no immunity may apply to Respondents if Petitioner cannot find another source of monetary compensation for his period of post-conviction confinement. Prosecutors, however, should not be required to perform required obligations at their peril, for fear that a simple legal error by the trial court might result in their civil liability.

The federal district court dismissed Petitioner's action under rule 12(b)(6) of the Federal Rules of Procedure because no factual allegations indicated wrongdoing by the prosecutor Respondents, who were statutorily immune from civil damages anyway. Plumas County, meanwhile, could not be liable under a *respondeat superior* theory and no allegations suggested an official policy, practice or custom of the county caused injury to Petitioner. In any event, prosecutors in California act as state, not county, officers. Additionally, Petitioner fails to address the fact that the district court's dismissal of his action under rule 12(b)(6) of the Federal Rules of Civil Procedure was based, at least in part, upon Petitioner's utter disregard of the pleading requirement to allege a short and plain statement of his claim under rule 8(a)(2) of the Federal Rules of Civil Procedure. Indeed, he persists in his bare listing of well over 600 purported facts. (See Appendix to Petition–Statement of Facts)

MISSTATEMENTS OF FACT OR LAW BY PETITIONER

A. Factual

In Petitioner's Appendix of Alleged Facts, Petitioner sets forth some 646 factual allegations that he purports to verify. Since there are, of course, no citations to the record at this point, prosecutor Respondents will not endeavor to quibble in a vacuum with each of these allegations. As a systemic objection, however, prosecutor Respondents note that Petitioner repeatedly asserts, without foundation, supposed facts that prosecutor Respondents purportedly "knew" or "conspired" about with judges. As the findings adopted by the District Court establish: "[P]laintiff has failed to allege specific facts from which a conspiracy between defendants could be inferred." (Petitioner's Appendix of Opinions and Orders, p. 9).

It is also worth noting that in the petition itself (p. 6), Petitioner incorrectly refers to his facts under the heading of "false imprisonment." That is a clear misstatement because Petitioner alleged no cause of action for false imprisonment. Furthermore, Respondent prosecutors acting in their litigation role cannot be deemed to have falsely imprisoned someone merely because the criminal conviction they obtained was subsequently reversed for trial court error.

B. Legal

The only legal authority Petitioner names in his petition (p. 5) to support his rule 10(c) statement is Gideon v. Wainwright, 372 U.S. 335, 344-345 (1963). While that case generally supports Petitioner's position that an attorney (in the absence of a valid waiver) should have been appointed for him before his preliminary examination in the state criminal trial court, it says nothing about the right to civil compensation for a criminal defendant improperly convicted on the basis of such defendants' testimony given without appointed counsel. Petitioner's inability here to recover money to compensate him for his

imprisonment in no way diminishes the importance of the Sixth Amendment in reducing wrongful convictions by invalidating those resulting from violation of the constitutional provision.

Petitioner otherwise relies upon the concept of "equity" (pp. 5, 7), supported by reference to a Latin maxim, but no legal authority of any kind. As in his factual statement, Petitioner in his legal argument persistently relies upon the prosecutor Respondents' purported knowledge of error, or "agreement" with the criminal trial court judges to rule incorrectly against Petitioner (pp. 9-10). Again, there is no specific factual foundation alleged to support such speculation, nor would it be material even if true. Petitioner cites no authority contradicting or in any manner questioning the authority cited in the memorandum opinion of the Ninth Circuit Court of Appeals in the instant case. KRL v. Moore, 384 F.3d 1105, 1110 (9th Cir. 2004). Prosecutor Respondents enjoy absolute immunity for their core prosecutorial activities in court as against a criminal defendants.

ADDITIONAL LEGAL GROUNDS FOR DENYING THE WRIT PETITION

Rule 15.2 of the U.S. Supreme Court Rules indicates that a brief in opposition should also set forth other arguments for denying the petition besides those stemming from rule 10 judicial discretion factors. The District Court and the Court of Appeals were clearly correct in their legal analysis, which explains why Petitioner cannot prevail on the merits. Plumas County Respondents herein succinctly set forth the legal basis for dismissing Petitioner's action for damages against them.

A. Petitioner Fails to State a Claim for the Deprivation of a Federal Right.

In his Second Amended Complaint, Robinson alleges that he was deprived of his constitutional rights in that he was wrongfully convicted and imprisoned, and that his right to assistance of counsel was violated. The District Court concluded that there was no nexus between the alleged conduct of which Plaintiff complained and any

existence of a deprivation by Respondents of a right, privilege or immunity secured by federal law under 42 U.S.C. § 1983. See Petitioner's Appendix of Opinions and Orders, p. 8.

Section 1983 provides, in pertinent part:

> Every person who, under color of any statute of any state . . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured[.]

Deprivation of counsel at a preliminary hearing was in no way a decision made by Cunan or McGowan, who were assigned to prosecute Robinson. The state appellate opinion, which overturned Robinson's criminal conviction, states that the purported procedural error at issue in this case was due to a *judicial* decision to proceed with the preliminary hearing without Plaintiff being represented by counsel. Specifically, the California Court of Appeal concluded as follows:

> Judge Olney questioned defendant about his finances in the presence of the prosecutor. . . . The court opined that defendant could go to a bank, get a second mortgage, and pay for an attorney. . . . The court found defendant did not qualify for court-appointed counsel.

People v. Robinson, 2003 Cal.App.Unpub. LEXIS 2622, *4-5 (2003) (emphasis added). The state appellate court never assigned any error regarding the provision of counsel to the district attorneys or to Plumas County. Clearly, any decision regarding the provision or presence of

counsel on Petitioner's behalf was a decision by the court, not the district attorneys appearing before the court in the proceeding. Thus, Petitioner has failed to state a claim against the Respondent deputy district attorneys for violation of a constitutional right.

B. Cunan and McGowan are Entitled to Absolute Prosecutorial Immunity.

It is well-established that prosecutors are "absolutely immune from liability under Section 1983 for . . . "*[any] conduct* that is intimately associated with the judicial phase of the criminal process.'" Burns v. Reed, 500 U.S. 478, 486 (1991) (internal citations omitted) (emphasis added) (quoting Imbler v. Pachtman, 424 U.S. 409, 431 (1976)). Accordingly, a prosecutor enjoys absolute immunity in prosecuting a criminal suspect and in proceeding with that prosecution through the verdict, regardless of the activity that occurs within the parameters of those proceedings. See Burns, supra, 500 U.S. at 486. So long as the prosecutor is acting as an advocate for the State, his or her actions are protected, even if those actions are malicious or dishonest. Imbler, supra, 424 U.S. at 428.

Here, Robinson contends that Cunan and McGowan remained in the courtroom and argued before a judge against the appointment of counsel for him during financial solvency hearings in his criminal prosecution. See Petitioner's Appendix of Alleged Facts ¶¶ 224-231, 276-281. Thus, Petitioner admits that any actions of the district attorney Respondents occurred in a judicial phase of the criminal case against him. Pursuant to Burns, supra, a prosecutor need only show that the activity in question occurred within the parameters of a judicial proceeding to be entitled to absolute immunity. Every alleged act of which Petitioner complains against Cunan and McGowan is related to Petitioner's criminal prosecution and, notably, every alleged act complained of occurred inside a courtroom during various aspects of the criminal prosecution. Whether Cunan or McGowan should properly have been in the courtroom during the solvency hearings and making arguments therein simply is not relevant, because they could not have advocated any position at all to the trial court had they not been acting

in their roles as prosecutors.

Petitioner cannot set forth any facts that would establish liability in this matter. In effect, Robinson asks this Court to create an exception to the doctrine of absolute prosecutorial immunity for him and him alone. (Petition, p. 9) Assuming *arguendo* that Petitioner had sustained some violation of his rights (which Respondents deny and which argument the District Court and Ninth Circuit Court rejected), this court has made clear that any lack of remedy cannot justify denying a prosecutor the absolute immunity to which he or she is entitled:

> To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty, but the alternative of qualifying a prosecutor's immunity would disserve the broader public interest.

Imbler, supra, 424 U.S. at 427. Based on the foregoing, Cunan and McGowan are entitled to absolute prosecutorial immunity. They would be unable to perform their respective jobs at all if constantly threatened with civil liability for any error they might make as prosecutors.

C. Petitioner Fails to State a Claim for Conspiracy.

Petitioner makes only cursory reference to his claims for conspiracy. See Petitioner's Appendix of Alleged Facts ¶¶ 258, 289, 309. Petitioner has presented no legal theory or argument, nor any facts, to support a claim for conspiracy. Moreover, as noted by the District Court, and as discussed above, Robinson has failed to state a claim that Appellees violated his constitutional under § 1983, which is a prerequisite to suit for conspiracy under § 1985. See Caldeira v. County of Kauai, 866 F.2d 1175, 1182 (9th Cir. 1989) ("the absence of a section 1983 deprivation of rights precludes a section 1985 conspiracy claim predicated on the same allegations"). Finally, assuming a

conspiracy actually existed to prosecute Plaintiff and deny him counsel, Respondents Cunan and McGowan are protected by absolute prosecutorial immunity for this claim, as well. Ashelman v. Pope, 793 F.2d 1072, 1077-78 (9th Cir. 1986) ("allegations that a conspiracy produced a certain decision should no more pierce the actor's immunity than allegations of bad faith, personal interest or outright malevolence."). Thus, the Petitioner's conspiracy claims lack merit as a matter of law.

D. Petitioner Fails to State a Claim Against Plumas County.

Robinson's assertion of § 1983 liability against Plumas County is based upon the alleged actions of Cunan and McGowan. Under federal law, only "person[s]" acting under color of law are liable for civil rights violations under § 1983. 42 U.S.C. § 1983. A state or state agent performing a government function is not a "person" who may be sued under §1983; individuals and agencies that are considered "arms of the state" are not "persons" within the meaning of §1983. Thompson v. City of Los Angeles, 885 F.2d 1439, 1443 (9th Cir. 1989). A district attorney is "a state official when he acts as a public prosecutor. . . . In the prosecution of criminal cases he acts by the authority and in the name of the people of the state." Ceballos v. Garcetti, 361 F.3d 1168, 1182-1183 (9th Cir. 2004); see Brewster v. Shasta County, 275 F.3d 803, 810-11 (9th Cir. 2001). Thus, any policy the district attorney establishes is a policy made on behalf of the State of California, not the local county in which that district attorney works. Weiner v. San Diego County, 210 F.3d 1025, 1028 (9th Cir. 2000); see McMillian v. Monroe County, Alabama, 520 U.S. 781 (1997). There is no respondeat superior liability under §1983. See Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694 (1978); Meehan v. County of Los Angeles, 856 F.2d 102, 106-07 (9th Cir. 1988). Thus, § 1983 mandates that local government entities may only be held liable for constitutional injuries that are inflicted pursuant to municipal policy, practice or custom. Monell, supra; Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986). Here, Petitioner vaguely asserts that Plumas County,

through the actions of its deputy district attorneys, had some sort of policy or practice to deny criminal defendants their constitutional right to counsel. Any policies or practices in this regard necessarily would have been promulgated by District Attorney Reichle, whom Petitioner voluntarily dismissed. However, Reichle does not set policy for Plumas County in any event, as any policymaking authority which Reichle has as District Attorney is exercised on behalf of the State of California. Thus, because Reichle is not the formal policymaker as to Plumas County, he does not represent Plumas County in any individualized decisions he may make regarding criminal prosecutions. Accordingly, Plumas County cannot be liable for any of Reichle's conduct or decisions Petitioner alleges in this action.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should promptly be denied. It raises no new or controversial issues of law. In any event, Petitioner is manifestly wrong on the law. Petitioner's contention hinges upon the gutting of basic principles and immunities long established in both California and federal law. He may not recover damages against state prosecutors performing their courtroom obligations.

Date: July 20, 2007 Respectfully submitted,

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